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FOCUS

President's Message

Mark Rogers

First of all, many thanks to Bowman and Brooke, who have provided content for this quarter's newsletter. We welcome the firm as a new Gold Level Sponsor of the Arizona Chapter and look forward to their involvement and CLE programs.

Second, for in-house counsel in Arizona who are not admitted to practice in the state, please take note of recent rule changes (effective January 1, 2009) which require you to register with the State Bar within 180 days of January 1. (If you become employed as in-house counsel after January 1, you only have 90 days to register.) This rule change means that in-house counsel registered but not admitted to practice in Arizona must meet the CLE requirements of at least one state bar, are subject to the disci-

plinary and disability jurisdiction of the Arizona Supreme Court and must pay a fee equal to 75% of the State Bar's annual membership fee.

For more information, you can find the State Bar's press release at: www.azbar.org/NewsCenter/news-releases.cfm

You can find the registration form at: www.myazbar.org/AZBarInfo/AZBarNews.cfm?id=384

Finally, for those of you who would like to read the rule itself, you can find the order of the Supreme Court of Arizona amending Rule 38 at: www.supreme.state.az.us/rules/2008RulesA/R-08-0006.pdf

Despite (or perhaps as a result of) the downturn in the economy, interest in providing programs to the chapter remains strong, and our calendar is full through the end of our year. (We are also building a pipeline of potential sponsors for the upcoming year and are predicting a very robust year of programming in 2009 to 2010.) I sincerely hope that you find this economical source of high-quality CLE, which was designed with you in mind, to be of continuing value.

Thank you for your membership and your participation in chapter programs, and I hope to see you at an upcoming meeting soon.

Three Essential Reminders for Saving Money On Outside Counsel Bills

Susan Hackett,

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Everyone's talking value: how to define and focus on value, how to assure that inside and outside counsel are adding value to the client's legal work, how to reinsert, reconnect or recalculate value into the cost of legal services.

When we launched the ACC Value Challenge last year, our premise was to help members drive greater value into their inside/outside relationships and management. We had no idea the markets would tank, that large firms would lay off lawyers by the thousands, that household-name companies would be going under, and that those still standing could be capable of cutting back to such a great extent.

So is it fair to say our timing was good with this project? Sure. But the client's tipping point of disgust had been reached even before the economy went south. Bad markets or good, when it comes to the cost of sophisticated corporate practice, especially at big firms, the emperor has no clothes. The downturn is "convenient" because it makes it impossible for lots of folks who'd prefer to continue to admire the emperor's wardrobe to do so.

You know you can't keep doing things the same way if you wish to respond to your client's directive to reinvent the company's cost structure, and yet the company's legal work will not conveniently cooperate and taper off. For many, their client's legal needs are expanding as their budgets and internal staff are shrinking. I'm here to help by offering what we have learned through the ACC Value Challenge.

Given the short space allotted here, here are my first three suggestions:

First, resist the urge to ask your firms for a rate cut. I know it seems like an easy and obvious fix, especially since the inelasticity in yearly firm rate increases is the only dependable metric we have in corporate practice. But trust me: it's not going to save you money at the end of the day and it's not going to create an incentive for

firms to re-think the way they do your work.

You've got a seismic change agenda to implement, so you need to ask your firms for something far more fundamental by way of change. And 10, 20, even 50 percent off of the inefficient way it's always been done is still going to leave you mired in the "way it's always been done."

Everything we're learning suggests that the all-in costs of a matter do not shrink when the firm agrees to cut their rates or discount their services. They simply bill more hours, assign less efficient staff to your work or add costs in other ways. They're not necessarily evil folks, but there seems to be this "gravity" that pulls them toward a higher bill regardless of what you negotiate for their rates. And this is the wrong result. If you want your firms to focus on value, you both need to rethink the way that the firm is charging for work and not just their hourly price tag.

Problem is, of course, that darned few of us know how to actually assess the value of a lawyer's contribution to a matter by standards other than how many hours they worked on a project multiplied by whatever rate the local or industry law firm services market will bear. This creates a financial disincentive for a smart lawyer to give you a 20-minute answer to your problem, rather than a 40-hour memo and 12 strategy meetings between four lawyers in the firm.

So here's my second suggestion: even if you've never done it before, spend some really serious time mining the knowledge that many of us either ignore or don't understand. Ask your firms to give you reports on the kinds of matters they've handled for you and the all-in costs for each. Then ask them to provide sub-reports on major functional portions of your matters that are regularly repeated: depositions, contract drafting, negotiation or settlement costs, whatever. Not law firm or lawyer tasks, such as meetings to discuss

strategies, research or phone calls with clients—all-in costs of every service provider and expense that led to the completion of the major functions that the lawyers were performing.

Then look at what you know about how much it costs you to do such things in-house (if you also share some of those jobs), and see if you can find out more about the costs that others in your industry or locality are paying. Then benchmark it. (Hey kids, that's what ACC local chapter meetings and committee listservs are for, right?)

I know the process won't be exact or perfect. Indeed, the accumulated costs you're researching are likely all-based amounts that were generated by the hourly system that we're trying to move beyond. But you have to start somewhere. This data is available and if it's not already packaged, then it's a first great exercise for you and your firm in looking at what the stuff we do really costs. And there are vendors out there with matter management systems that are designed to help you and your firms enter data going forward in ways that allow easy manipulations and, perhaps best of all, firm-to-firm comparatives.

Ah, comparatives. Now you'll know more about whether you've got a couple of firms that are doing great and doing it for less. How come? What do they do that's replicable in other firms or in your future management of matters? Is it fewer people billing the project? Is it the lawyers' location that makes them cheaper? Is it an ethic within the firm simply not to gauge clients? Do these firms have a better grasp of legal process management and available staff and technology options? Whatever it is, those firms should get rewarded with more work from you, and you can suggest price reductions to others—not on their rates, but as a percentage off of the accumulated bills that represent the total fees charged for the matter.

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So the conversation goes: “I’d like to retain you to do this matter at this cost—all in. If you can’t agree that this is a price you can live with, or if you can’t figure out if that’s profitable for you since you don’t know what it costs you to do my work, that’s fine. The X firm will take the work. If you take this work at this cost, there will be no additional fees (unless these predefined kinds of unlikely events happen). I don’t need to see weekly or monthly bills, and I don’t care how you staff the matter so long as Cathy is in charge of the project. I don’t care if you fly first class or take two associates with you to court to learn the ropes. I kinda hope you will. I’m paying this cost and you decide how you want to pay your bills and do your business. If you get more efficient and make a good profit on our work while accomplishing the objective we’ve set and offering us the quality we know is your hallmark, I will not ask for any of the money back—you’ll have earned it, because you’ve provided me with the value I defined at the cost the matter was worth.”

Something like this is what you’re after if you really want to save money and create the budget management and predictable results that your company expects of everyone who supervises client assets and procurement of services.

Third and last tip: I’m obviously making this sound easier than it is. You can’t reinvent your or your firms’ processes overnight. You can’t expect that everything you do will fit well into this format, especially as we’re all just learning this value game. We’re going to have to work toward it incrementally. And we may discover even better solutions along the way. You all are really smart and inventive people. So here’s my offering to you on how to start to make it happen: Meet/Talk/Act.

Meet/Talk/Act is perhaps the most important initiative for members in the ACC Value Challenge community. There are no pat answers to any of these questions and no “one-size-fits-all” solutions (indeed, one size fits one!) The only way you’ll discover what can work for you, especially given the personal relationships and highly qualitative factors that often defy easy quantification, is to sit down and talk about all this in a collaborative fashion with your

department team (take yourself out for a contemplative lunch with friends if you’re a solos) and your outside lawyers.

So here’s the task: Pick their three best firms, however you define that. Meet with them. Set an agenda (there’s a menu of possible agenda topics for you to consider on our Meet/Talk/Act information sheet online—see links below). Talk about what’s most important to the continuation of your relationship in a more productive and value-driven fashion. Solicit ideas from each other for lowering costs, process and staffing improvements, budgeting and planning or metrics to evaluate progress. And then act. Just choose a few of the things you talked about as first focus points and do them. Don’t try to change the world on the first day or tackle lots of things at once. Choose something quantifiable, something measurable, something that drives efficiency and value as opposed to rehashing “more of the same.”

ACC will be helping to take Meet/Talk/Act around the country by cohosting ACC Value Challenge events with selected chapters. At these sessions, we’ll put about 20 top in-house and 20 top outside counsel leaders (folks with executive decision-making capacity and influence within their institutions) at round tables of 10. We’re going to give them problems that have been identified by large numbers of members and firms like, what are the appropriate metrics by which to evaluate a firm’s or lawyer’s performance on a matter? How can early case assessment and resolution be better integrated into the cycle of litigation at a company? How can we address the entry-level associate crisis? What kinds of staffing options work best on each of the following matter types? And so on.

Then we’re going to make them talk and capture their ideas, benchmarks, solutions and further queries. And we’re going to publish them for you. So maybe you ask for an invite to come to a session—the events schedule is posted below. Or maybe you just read some of the findings that will begin to trickle out from these sessions and use them as agenda items for your own Meet/Talk/Act sessions with your firms. Or maybe, since we’re asking firms to do the same (call three of your best clients and invite them to lunch to talk about...), you’ll get invited to a Meet/Talk/

Act session by one of your firms. How refreshing!

Want more detail? Want to see the ideas and practices that we’ve already captured and posted that can help drive your practice toward value? Want to host a Meet/Talk/Act with your firms or an internal meeting on this topic in your department? There are resources online for you at acc.com/value_challenge. And, as always, you can contact ACC staff or our Steering Committee leadership with your thoughts and questions, too!

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Meet/Talk/Act Overview (a 1-pager on how law departments and law firms can get started to reconnect value to costs of legal services): www.acc.com/valuechallenge/meetTalkAct

Leadership Resource Page (for those who want to host a meeting or review project summary-type documents on this topic): www.acc.com/advocacy/valuechallenge/Leadership-Resource-Center.cfm

ACC Value Challenge “Covenant with Counsel” (a sample charter for firms and departments that want to reinvent their relationship and set the terms of their partnership): www.acc.com/valuechallenge/covenant

ACC Value Challenge Toolkit (a library of practical resources for those interested in driving value): www.acc.com/advocacy/valuechallenge/toolkit/index.cfm

Are The Documents Of A Corporate Defendant Plaintiff's Work Product?

By Jill S. Goldsmith, Bowman and Brooke LLP

With the explosion of instant communication through the Internet and organizations like the Attorneys Information Exchange Group, Inc. (AIEG), plaintiffs' lawyers no longer "reinvent the wheel" or "work in a vacuum" when pursuing claims of defect that have been pursued by others in pattern or similar litigation. For example, as a member of AIEG, an attorney has access to newsletters and publications concerning legal, factual and technical developments, access to databases of pleadings, briefs, and research memoranda, access to a database of prior deposition and trial testimony, and access to manufacturers' internal documents. The Internet and these computerized networks allow document exchange groups and repositories to provide easy access to a corporate defendant's internal documents, depositions of corporate employees, and form discovery to serve with a complaint. As a result, defendants now propound discovery to plaintiffs to discover which of its internal documents plaintiff will use to support plaintiff's claims.

With the increased access to the corporate defendant's documents without obtaining the documents from the defendant in the instant case, some controversy has arisen about whether a plaintiff must identify or produce the defendant's internal documents to the defendant in discovery. Plaintiffs argue that the corporate defendant's documents that they obtained from independent sources or from the defendant in prior litigation is protected from discovery by the work product doctrine because their counsel selected and organized a discreet set of corporate internal documents for use in their case. Defendants argue that their internal documents are not plaintiffs' counsel's work product because plaintiffs did not create the documents, nor were the documents prepared in anticipation of litigation. Additionally, they contend that identification or production of corporate defendants' documents will not reveal the plaintiff's attorneys' mental thought processes because defendants do not have access to the larger source of documents

so they cannot discern plaintiffs' counsel's selection process.

Does the work product doctrine protect the defendant's documents and employee deposition transcripts, which plaintiff's counsel gathered through sources other than the defendant in that case? The better reasoned authorities that have addressed the issue have rejected plaintiffs' work product objection to production of the defendant's internal documents. Additionally, Federal Rule of Civil Procedure 26 and state rules of civil procedure that mandate disclosure of documents support the position that there is no work product protection for defendant's documents that plaintiff gathers from sources other than the defendant in that case.

In *Bohannon v. Honda Motor Co.*, for example, plaintiff sued Honda Motor Company and alleged that the Honda all-terrain vehicle (ATV) was defective. Defendant moved to compel responses to document requests that sought copies of documents that plaintiff contended supported any allegation in the lawsuit.

Plaintiff objected to the document request on work product grounds because the vast majority of the responsive documents were obtained through an ATV litigation group. Plaintiff argued that the documents were selected from a large number of documents at the litigation support group. Relying on cases such as *Sporck v. Peil* and *Omaha Public Power Dist. v. Foster Wheeler Corp.* plaintiff argued that the disclosure of the documents would reveal counsel's opinions, mental processes, and legal theories.

The Bohannon court noted that to qualify as work product under Rule 26(b)(3), Federal Rules of Civil Procedure, the material must be: 1) documents and tangible things; 2) prepared in anticipation of litigation; and 3) prepared by or for another party or by or for that other party's representative. In *Bohannon*, the documents were not prepared by or on behalf of plaintiff.

The Bohannon court then analyzed whether the documents were grouped, selected, and synthesized in anticipation of litigation. Plaintiff contended that his counsel obtained the documents after he consulted with his counsel to prepare for litigation against Honda. The court noted that the contention was unsupported by affidavit or specific explanation. Additionally, the court said that the work product status does not apply to documents submitted to or received by a third party.

The Bohannon court rejected plaintiff's argument that counsel's selection of documents constitutes opinion work product, which is immune from discovery in the absence of extreme need. The Bohannon court relied on cases such as *San Juan Dupont Plaza Hotel Fire Litigation*, which held that the grouping of documents does not constitute opinion work product. The San Juan court rejected cases like *Sporck* and explained:

In *Sporck*, the majority emphasized that "[i]n selecting and ordering a few documents out of thousands, counsel could not help but reveal important aspects of his understanding of the case." 759 F.2d at 316 (quoting *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 144 (D. Del. 1982)). This reasoning, we suggest, is flawed because it assumes that the revelatory nature of the sought-after information is, in itself, sufficient to cloak the information with the heightened protection of opinion work product. That is simply not the case; much depends on whether the fruits of the screening would soon be revealed in any event . . .

For these reasons, we rule that compelled disclosure of document lists under the district court's identification protocol does not implicate opinion work product and thus does not constitute an impermissible per se intrusion into the lawyer's protected zone of privacy.

The Bohannon Court found the rationale of *San Juan* sounder than plaintiff's

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arguments and held that the disclosure of documents would not reveal the mental processes of counsel because none of the documents were created, grouped, or synthesized by plaintiff or his counsel. The Bohannon court ordered plaintiff to produce documents obtained from the litigation support group that supported plaintiff's claims, including documents created by Honda, and deposition transcripts of Honda employees.

In *Bartley v. Isuzu Motors Ltd.*, plaintiff brought a product liability lawsuit against Isuzu Motors Ltd. (Isuzu), alleging that a defectively designed Isuzu vehicle caused plaintiff's injuries. Isuzu filed a motion to compel plaintiff to produce all Isuzu documents that plaintiff obtained through various sources, including the litigation clearinghouse operated by the American Trial Lawyers Association (ATLA). Plaintiff's counsel in that case acknowledged that they had received such documents, but argued that the work product doctrine protected them from production absent "substantial need" and "undue hardship" because the compilation and selection of documents were part of plaintiff's investigation.

Like Bohannon, the Bartley court stated that the work product doctrine protects documents and other tangible materials that are prepared in anticipation of litigation by or for a party or his counsel. The Bartley court ruled that the corporate defendant's documents, which were secured from other sources such as ATLA and were not prepared by plaintiff or his counsel, are not subject to the work product doctrine. Because defendant's documents were in defendant's control, the Bartley court ordered plaintiff to initially provide a detailed list of the documents created by the defendant and depositions in plaintiff's possession.

Statements of defendants' employees obtained by plaintiff's counsel from sources other than the defendants in the pending lawsuit were not protected by the work product doctrine in *Hendrick v. Avis Rent-A-Car Systems, Inc.* In reaching this conclusion, the court recognized the ease with which similarly situated plaintiffs now share and exchange information, particularly in product liability litigation where formal and informal networks have been

established by plaintiff's counsel pursuing similar claims. The Hendrick court said: "The sharing of information among similarly situated plaintiffs does not, however, shield the information exchanged from disclosure pursuant to the discovery provisions of the Federal Rules of Civil Procedure." Because the materials were not prepared by or on behalf of plaintiff, the court found that the documents were not plaintiff's counsel's work product.

The Hendrick court also rejected plaintiff's contention that the mere identification of documents reviewed would reveal his lawyer's litigation strategy. The court explained that plaintiff was not required to reveal every document counsel examined, nor required to disclose from where the documents were obtained and why. Only the identity of statements made or attributable to an adverse party were requested.

Relying on authority from the Second Circuit Court of Appeals, which cautioned over extending the work product doctrine to the sifting and selection of documents, the Hendrick court said that the extension of the work product doctrine depends upon "the existence of a real, rather than speculative concern that the thought process of . . . counsel in relation to pending or anticipated litigation would be exposed." Absent more than conclusory statements that production would reveal counsel's strategy and mental thoughts, the Hendrick court was not persuaded that the work product doctrine protected the documents. Plaintiff was ordered to produce a list of documents and, to the extent that defendant did not have a copy of the documents, plaintiff was ordered to produce the documents.

One state court has reached the opposite conclusion and protected from discovery defendant's documents obtained by a plaintiff from sources other than the defendant. In *Smith v. Florida Power & Light Co.*, the court considered whether an attorney's selection of documents, which by themselves are not work product, are as a discrete unit, immune from discovery. In *Smith*, Sam Smith was electrocuted while trimming trees located along a right of way dedicated to Florida Power and Light. Smith's personnel representative sued the Florida Power and Light (FPL) and alleged FPL breached its duties to inspect and maintain its power lines, to remove

encroaching tree limbs, and to adequately warn those who might come into contact with the power lines.

After FPL learned that plaintiff's counsel obtained FPL's business documents from someone other than FPL, it propounded a request for production for all documents of FPL in plaintiff's possession, which were not produced by FPL in that case. Plaintiff's counsel objected to the request on the basis of attorney work product because the grouping of FPL documents, collected outside the discovery process of that case, would reveal his mental impressions. The trial court overruled the objections and ordered plaintiff to produce the documents. On appeal, the Third District Court of Appeals of Florida reversed the trial court's ruling.

The Smith court relied on Florida Rule of Civil Procedure 1.280(b)(3), which is Florida's counterpart to Federal Rule of Civil Procedure 26(b)(3). The Smith court also relied on the United States Supreme Court's discussion of work product in *Hickman v. Taylor*. In *Hickman*, the Court stated:

Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. Although "[w]hat constitutes 'work product' is incapable of concise definition adequate for all occasions," an attorney's evaluation of the relative importance of evidence falls squarely within the parameters of the privilege.

The Smith court recognized that the FPL documents themselves were not the work product of the plaintiff's attorney. Rather, relying on *Sporck v. Peil*, and *Shelton v. American Motors Corp.*, the Smith court found that the FPL documents "comprise a grouping that is the end result of counsel's selection process; identification of the group would reveal counsel's mental impressions." The collection of documents was held to be "opinion work product," which is "absolutely or nearly absolutely privileged."

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The decisions that find no work product protection for defendant's documents that are gathered by a plaintiff from independent sources are better reasoned than *Smith v. Florida Power & Light Co.* for several reasons. First, Rule 26(b)(3), Federal Rules of Civil Procedure, protects as work product only documents and tangible things that are prepared by a plaintiff or his representative in anticipation of litigation. Defendant's internal documents, which are created in the ordinary course of business are not prepared by plaintiff or his or her counsel and they are not prepared in anticipation of litigation. Accordingly, by its terms Rule 26(b)(3) does not protect the defendant's documents as the plaintiff's work product.

Second, the work product privilege is designed to permanently protect, in the absence of extreme need, information that would reveal an attorney's mental thought processes. Because the goal of the work product protection is defeated once plaintiff's counsel uses the defendant's documents in trial, there should be no work product protection for these documents before trial.

Third, the *Smith* court's rationale for its decision is flawed. *Smith* relied on *Sporck* and *Shelton* in reaching its decision to prohibit production of relevant documents because plaintiff's counsel selected them as relevant to the litigation. However, the *Sporck* and *Shelton* courts did not prevent discovery of relevant documents. In *Sporck*, no argument was made that relevant documents should be withheld from production. Indeed, defendants produced hundreds of thousands of documents. Defense counsel raised the work product objection to shield his selection of a few of the documents from the thousands already produced in the case. The selected documents were shown to a deponent before his deposition. In reaching its holding that defense counsel need not identify which documents counsel showed to a deponent, the *Sporck* court quoted from *James Julian Inc. v. Raytheon Co.*:

In selecting and ordering a few documents out of thousands counsel could not help but reveal important aspects of his understanding of the case. Indeed, in

a case such as this, involving extensive document discovery, the process of selection and distillation is often more critical than pure legal research. There can be no doubt that at least in the first instance the binders were entitled to protection as work product.

Additionally, the *Sporck* court recognized that Rule 612, Federal Rules of Evidence, allowed opposing counsel to ask a deponent to identify documents from which he learned the information to answer counsel's questions in deposition.

Shelton also does not involve a party's refusal to produce relevant documents requested by opposing counsel. Indeed, production of documents already had occurred in the litigation. Rather, plaintiff wanted to depose defense counsel to determine if the defendant responded truthfully to the discovery requests.

The defendant in *Shelton* sought protection of defense counsel's knowledge of the existence of documents because her knowledge and memory about the existence of documents would reveal defense counsel's views about what is important. Defendant argued that defense counsel was only likely to remember the documents she selected as important and significant to defense theories in the case. The *Shelton* court agreed with defendant. Accordingly, the court held that ". . . where, as here, the deponent is opposing counsel and opposing counsel has engaged in a process of selecting and compiling documents in preparation for litigation, the mere acknowledgment of the existence of those documents would reveal counsel's mental impressions, which are protected as work product." The *Shelton* court did not prohibit the plaintiff from conducting discovery to obtain relevant documents through traditional discovery means such as document requests.

In short, neither *Shelton* nor *Sporck* supports the *Smith* court's conclusion that all relevant documents are immune from production because the gathering process would reveal the mental impressions of the attorney who gathered relevant documents. Rather, the courts in *Shelton* and *Sporck* protected counsel's selection or memory of a few documents from

thousands already produced because the selection of a few documents might reveal the mental process of the attorney who selected them.

Finally, the mandatory disclosure rule, Rule 26, Federal Rules of Civil Procedure, and automatic disclosure rules enacted by state courts also support the cases that hold that documents obtained by plaintiffs from third parties are not plaintiff's work product. Rule 26(a), Federal Rules of Civil Procedure "imposes on parties a duty to disclose, without waiting for formal discovery requests, certain basic information that is needed in most cases to prepare for trial or make an informed decision about settlement." As explained by the comments to the 1993 amendment to Rule 26, all parties, early in the case, must exchange information regarding potential witnesses, documentary evidence, damages, and insurance. Rule 26(a)(1) requires a party to voluntarily make disclosures of information timely, even though the party has not finished its investigation, the party challenges the sufficiency of another party's disclosures, or the other party has not made its disclosures. The purpose of the revisions to Rule 26 is to accelerate the exchange of basic information about the case and to eliminate the paperwork involved in requesting the information. Rule 26 obligates both sides to a case to produce relevant documents.

State courts also have implemented voluntary disclosure rules. For example, in 1991, Arizona implemented a disclosure rule that requires all parties to voluntarily disclose nine categories of information forty days after defendants file an answer. Indeed, Rule 26.1(a)(9), Arizona Rules of Civil Procedure, requires all parties to voluntarily provide:

[a] list of the documents or, in the case of voluminous documentary information, a list of the categories of documents, known by a party to exist whether or not in the party's possession, custody or control and which that party believes may be relevant to the subject matter of the action, and those which appear reasonably calculated to lead to the discovery of admissible evidence, and the date(s) upon which those documents will be made, or have

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been made, available for inspection and copying.

Arizona's rule was promulgated to require cooperation among parties and encourage early evaluation of a case. Arizona's rule also was intended to make litigation more efficient, less expensive, and more accessible to people and to avoid "litigation by ambush." Colorado, Alaska, and Nevada also have mandatory rules for voluntary disclosure of documents.

Rule 26, Federal Rules of Civil Procedure, and automatic disclosure rules in state courts create an obligation on both sides to wade through documents and databases to identify and produce relevant documents. Thus, the fact that a corporate defense counsel has reviewed thousands of documents and concluded that some are relevant to the litigation does not cloak those internal documents with work product protection. For example, defendants cannot cloak internal memoranda from discovery simply because defense counsel selected them from a databank or file cabinet filled with internal memoranda on a variety of subjects. Likewise, Rule 26, Federal Rules of Civil Procedure, and automatic disclosure rules in state courts also require plaintiffs to wade through documents and databases to identify and

produce relevant documents in their possession, custody, or control. Accordingly, plaintiff's determination that certain documents are relevant does not transform the documents into plaintiff's work product. The disclosure rules require both sides to produce all relevant documents, not just the ones a party may designate as particularly significant to the success of one side. Because all relevant documents must be produced by both sides, neither side will likely be able to discern what is important or significant to the opposing counsel.

By requiring both sides to produce all relevant documents, regardless of the source from which they were obtained, the goals of automatic disclosure rules can be achieved. Parties will spend less time and money in discovery and on discovery gamesmanship and more time in case evaluation and trial preparation. Additionally, production of defendant's documents by plaintiffs and defendants avoids litigation by ambush, which also advances the goals of automatic disclosure rules.

Conclusion

Although one court has protected documents that plaintiff's counsel obtained from sources other than a defendant because it is work product, the better reasoned opinions find no work product protection for the documents. Moreover,

the automatic disclosure rules that exist now in federal court and some state courts further support the position that plaintiffs cannot cloak defendants' documents with work product protection by obtaining them from a third party. Both sides have affirmative obligations under mandatory or voluntary disclosure rules to identify and produce relevant documents. In the absence of a mandatory disclosure rule, plaintiffs and defendants must identify relevant documents in response to document requests. While plaintiffs' access to defendant's documents from third parties via the Internet or other networks is relatively new and that access may have created some confusion about a plaintiff's obligation to produce the documents, the obligation is the same for plaintiffs and defendants.

Authors

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Ms. Goldsmith dedicates this article to the memory of Gary T. Walker, a former partner at Bowman and Brooke who encouraged her to become involved in DRI. Reprinted with permission. Copyright 2001, Defense Research Institute, Inc.

Preemption As a First Line of Defense Against State Law Tort Claims for Product Liability Defendants?

By William F. Auther and Mary M. Kranzow, Bowman and Brooke LLP

On August 14, 2008, President Bush signed into law The Consumer Product Safety Improvement Act of 2008 (CPSIA).¹ This law is the most sweeping consumer product safety law since the founding of the Consumer Product Safety Commission (Commission) more than 30 years ago. Although Congress enacted the CPSIA largely in response to widely-publicized recalls on imported children's toys from China, the Act reaches far beyond children's toys and will affect virtually all manufacturers, importers, distributors and retailers of consumer products.²

1. See H.R. 4040, 110th Cong. (2008) (Pub. L. No. 110-314).

2. See Info Alert, National Conference of State Legislatures Law and Criminal Justice Standing

Of significant interest particularly to businesses involved in the sale of consumer products is the CPSIA's potential to preempt state law tort claims. While the Act does not explicitly change the current preemption analysis, the new product standards under the CPSIA may preempt existing or new state laws including common law tort claims which address the same safety risks.

In determining whether state law tort claims are preempted under the Act, the nature of the claim and any applicable

Committee, Office of State-Federal Relations, August 18, 2008, at <http://www.ncsl.org/stand-comm/sclaw/CPSAPreemption.htm>.

federal standard must be examined. For example, state law tort claims based negligence, design defects and failure to warn may be preempted under the new federal standards pertaining to lead, phthalates, and four wheel all-terrain vehicles if these standards address the same safety risks. Accordingly, it is important for consumer product liability defendants to not only understand their new obligations under the Act, but to also utilize this preemptive language in defending product liability claims grounded in state law.

This article explores the preemptive effect of the CPSIA and discusses how these new

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product standards may be treated under the Act.

Preemption Defined

The doctrine of preemption is based on the Supremacy Clause of the United States Constitution which provides that the "... Constitution and the Laws of the United States ... shall be the supreme Law of the Land."³ Any preemption analysis begins with the intention of Congress and the premise that state law will not be superseded unless that is the "clear and manifest purpose of Congress."⁴

The Supremacy Clause has been interpreted to mean that state law is preempted by federal law if it conflicts with federal law.⁵ State laws may conflict with federal law and be preempted in the following three ways: (1) Congress may expressly preempt state law through a congressional command in the statute's language; (2) Congress may impliedly preempt state law if federal law so thoroughly occupies a legislative field "as to make reasonable the inference that Congress left no room for the States to supplement it"⁶; or (3) Congress may impliedly preempt state law if state law "actually conflicts with federal law" because (a) it is impossible to comply with both state and federal requirements, or (b) state law obstructs the purposes and objectives of Congress.⁷

Preservation of Preemption Framework

Section 231 of the CPSIA preserves the basic preemption framework of the Consumer Product Safety Act (CPSA).⁸ The CPSIA adopts the premise under the CPSA that a state cannot establish or continue in effect any law or regulation intended to

3. U.S. CONST. art. VI, cl.

4. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S.218, 230 (1947)).

5. *Id.*, citing *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

6. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230.

7. *Great Dane Trailers v. Estate of Wells*, 52 S.W.3d 737, 743 (Tex. 2001).

8. See CPSIA Section Summaries: Section 231 Preemption, U.S. Consumer Product Safety Commission, at <http://www.cpsc.gov/ABOUT/cpsia/summaries/231brief.html> (last visited on January 6, 2009).

deal with the same risk of injury associated with a product addressed by the CPSA unless the state standard is identical to the federal standard.⁹ In fact, the Commission's guidelines explicitly state that the CPSIA is intended to preempt all state laws that address an identical hazard.¹⁰ The Act also allows the Commission to exempt a state or local law from its requirement if the Commission finds that the state or local law affords "a significantly higher degree of protection than the Commission's statute, standard, or regulation, and that it does not unduly burden interstate commerce."¹¹

The CPSIA also prohibits the Commission from altering the specified preemption provisions of the CPSA, Federal Hazardous Substances Act (FHSA), Flammable Fabrics Act (FFA), and Poison Packaging Prevention Act of 1970 (PPPA) by any rule or regulation or by reference to any statement of policy, executive branch statement, or other matter associated with a rule or regulation.¹² In enacting the CPSIA, this provision was not intended to limit the Commission's ability to explain the scope of its rules or regulations, but to prevent the Commission from creating preemption where none was intended by Congress.¹³

9. See 15 U.S.C. 2075(a); see also 16 CFR 1061.3.

10. See Consumer Safety Improvement Act of 2008 – Frequently Asked Questions (FAQ) No. 14, Bureau Veritas Consumer Products, www.bureauveritas.com/cps, http://www.bureauveritas.com.br/wps/wcm/connect/efbe2c804b5e3fc08be08f93f26b1a3d/BureauVeritas_CPSIA_FAQ.pdf?MOD=AJPERES&CACHEID=efbe2c804b5e3fc08be08f93f26b1a3d (last visited on January 6, 2009).

11. See 15 U.S.C. 2075(b)-(c); see also 16 CFR 1061.3.

12. See Pub. L. No. 110-314 § 231(a).

13. See *supra* note 8; see also Pub. L. No. 110-314 § 231; see also *AAJ Sends Obama Team Strategies to Reverse Bush "Complete Immunity" Regulations*, American Association for Justice, January 12, 2009 (discussing proposed plan for the Obama administration to reverse regulations preempting state claims).

Preemptive Effect of New Standards

Several new product standards under the Act may preempt state standards including common law tort claims on the same subjects. For example, the CPSIA establishes uniform national standards for lead in children's products.¹⁴ Specifically, section 101(g) of the CPSIA states that the lead standards are treated as a regulation under the FHSA:

Any ban imposed by subsection (a) or rule promulgated under subsection (a) or (b) of this section, and section 1301.1 of title 16, Code of Federal Regulations ... shall be considered a regulation of the Commission promulgated under or for the enforcement of section 2(q) of the Federal Hazardous Substances Act (15 U.S.C. 1261 (q)).

In turn, section 18(a)(1)(B) of the FHSA provides:

... if under regulations of the Commission promulgated under or for the enforcement of section 2(q) a requirement is established to protect against a risk of illness or injury associated with a hazardous substance, no State or political subdivision of a State may establish or continue in effect a requirement applicable to such substance and designed to protect against the same risk of illness or injury unless such requirement is identical to the requirement established under such regulations.

Therefore, because the CPSIA establishes a standard to protect against a risk of injury associated with lead, state common law tort claims that would hold a manufacturer to a different standard than the federal standard should be preempted.¹⁵

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14. See Pub. L. No. 110-314 § 101; see also FAQs: Do the new standards in the CPSIA, such as the new limits on lead-containing paint and lead content, phthalates and the like, preempt state laws that address the same risk of injury?, U.S. Consumer Product Safety Commission, at <http://www.cpsc.gov/about/cpsia/faq/preemption.html> (last visited on January 6, 2009).

15. Unless exempt by application to the Commission, see *supra* note 11.

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Additional provisions of the CPSIA create standards for other consumer products. These new standards allow additional opportunities to argue for preemption of certain state law tort claims. Even the CPSC guidelines for these new standards suggest that they preempt state law.¹⁶ For example, section 108 of the CPSIA establishes a national standard for phthalates in children's products.¹⁷ The new CPSIA standard for four wheel all-terrain vehicles may preempt certain state law tort claims.¹⁸ Further, the adoption of ASTM F963 under section 106 of the CPSIA as a mandatory federal toy safety standard may also preempt state law.¹⁹ However, for this toy safety standard, the CPSIA permits states to petition the Commission to "grandfather in" existing state laws of this kind so long as they are more stringent than the federal standard.²⁰ The deadline

16. See supra note 14.

17. See Pub. L. No. 110-314 § 108.

18. See Pub. L. No. 110-314 § 232(a).

19. See Pub. L. No. 110-314 § 106.

20. See Pub. L. No. 110-314 § 106(h); see supra note 14; see also <http://www.cpsc.gov/library/foia/foia09/media/media.html> (Four states have submitted exemption applications for existing state or political subdivisions of a state toy and children's product safety standards in effect under CPSIA Section 106(h)(2)).

for states to apply to have their toy safety standard deemed exempt from preemption was November 12, 2008.²¹

Clarification Regarding State and Local Law

The CPSIA further clarifies the extent to which CPSA laws and regulations preempt, limit or otherwise affect federal, state, or local law.

The CPSIA prohibits the Commission from construing statutes to preempt any cause of action under state or local common law or state statutory law regarding damage claims.²² Read literally, this means that only the Commission cannot preempt consumer lawsuits under state common law and state statutes. Presumably then, state and federal courts are free to decide whether a product safety standard under the CPSIA preempts a state standard.²³

21. See Pub. L. No. 110-314 § 106(h); see supra note 14.

22. See Pub. L. No. 110-314 § 231(a).

23. See John B. O'Loughlin Jr., Consumer Product Safety Improvement Act: Not the Last Word on Preemption, 36 BNA Product Safety & Liability Reporter 1037, 1040-41 n. 41, October 20, 2008 (citing *BIC Pen Corp. v. Carter*, No. 05-0835, slip op. (Tex. Apr. 18, 2008)).

The CPSIA also affords states the opportunity to exempt from preemption some laws adopted at the state level before the CPSIA's enactment.²⁴ For example, the requirements under the CPSIA and the FHSA shall not be construed to preempt or affect state warnings requirements under state laws, such as California's Proposition 65, that were in effect on or prior to August 31, 2003.²⁵

Conclusion

While the CPSIA does not fundamentally change preexisting preemption statutes, new product safety standards promulgated under the Act will undoubtedly raise federal preemption questions. New rules and regulations to be published by the Commission are of keen interest to all product liability defendants. Though the full scope and impact of the CPSIA will not be known for some time, it is important for businesses involved in the sale of consumer products to understand their new risks and obligations so that they can more effectively defend product liability cases.

24. See Pub. L. No. 110-314 § 231(b).

25. See U.S. Consumer Product Safety Commission, supra note 8.

Limits on Depositions of Corporate Executives: Special Rules for Important People

By Jill Goldsmith, Bowman and Brooke LLP

With the growth and globalization of the economy in recent years, individuals are increasingly in contact, directly or indirectly, with large national or multi-national corporations. American consumers buy products that are designed and manufactured by very large companies, that are led by high-level executives who often have little direct knowledge of the day-to-day operations of the company. As a result, products liability claims, insurance disputes, and employment disputes often pit an individual against a large corporate structure, and the individual may not know which persons in the company can provide information the plaintiff believes he or she needs.

After a lawsuit is filed, some plaintiffs' lawyers attempt to begin the discovery process with depositions of corporate executives or others at the "apex" of the company's hierarchy. These corporate executives generally have no personal knowledge of the facts surrounding the disputes with individuals, but their depositions are requested anyway. The United States Supreme Court has recognized that this behavior may well be improper. In *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975), it acknowledged and disapproved of the common practice of some plaintiffs in securities litigation, who abuse the discovery rules "to simply take up the time of a number of other people, with the right to do so representing an in terrorem

increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence." See *Armstrong Cork Co. v. Niagara Mohawk Power Corp.*, 16 F.R.D. 389 (S.D.N.Y. 1954) (noting that the trial court should be alert to make sure that the liberal rules of procedure for depositions are used only for the intended purpose and not as a litigation tactic to harass the opponent or waste money).

Guidelines for Deposing Executives

In spite of the concern raised by the Supreme Court more than 25 years ago, the rules of civil procedure in state and

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federal courts generally allow a party to depose “any person.” See, e.g., Rule 30(a) of the Federal Rules of Civil Procedure. Rule 26(b)(1) generally entitles a party to discover material that may be only slightly relevant to the subject matter of the claim, and material that may appear no more than “reasonably calculated to lead to the discovery of admissible evidence.” Do these broad rules that allow liberal discovery mean that a plaintiff has a right to depose the corporate defendant’s president or other high-level executive? In general, the courts that have considered this issue have precluded the taking of such depositions unless and until other less intrusive avenues have been exhausted, and the plaintiff can show that the deponent has unique or superior knowledge of facts that are relevant to the claim. When the corporate executive is personally involved in the issue in dispute, courts have allowed the depositions. Even when the executives’ depositions have been ordered, courts are willing to set limits on the deposition to avoid abuse and harassment.

Several state and federal courts have created a special set of guidelines or rules to evaluate plaintiffs’ requests for the corporate executives’ depositions. These rules allow (or arguably require) courts to prohibit depositions of certain high ranking corporate officials unless plaintiff meets his or her burden to prove that they have unique or superior knowledge of the issues in the lawsuit and that alternative methods to obtain the information have been exhausted without success.

In *Liberty Mutual Insurance Co. v. Superior Court*, 10 Cal.App.4th 1282, 13 Cal.Rptr.2d 363 (1992), review denied, the real party in interest, Gunda Frysinger, sued her husband’s employer’s workers’ compensation carrier for failing to provide 24-hour-a-day care following an industrial injury that left Mr. Frysinger physically and mentally disabled for life. Mrs. Frysinger alleged claims of fraud and intentional infliction of emotional distress following allegedly broken promises to provide the care. She sued Liberty Mutual, its president and chief executive officer, and the local claims manager.

Frysinger’s attorneys noticed the deposition of the president and chief executive officer. Liberty Mutual moved for a protective order to prohibit the deposition, arguing that there was no legitimate need to depose this executive and that the deposition was done only to harass and annoy. Liberty supported the motion with an affidavit of the executive, stating that he was not involved in the handling, supervision, or management of any claims, and that he had no knowledge of any facts alleged in Mrs. Frysinger’s complaint. The plaintiff’s attorneys argued that the executive had constructive notice of the alleged fraud and emotional distress that Liberty’s agents committed because two letters that were written on Frysinger’s behalf were copied to the executive. The trial court denied Liberty’s motion for a protective order; Liberty appealed.

The California Court of Appeal noted that depositions of senior-level officials that are conducted before less intrusive discovery methods are exhausted “raise a tremendous potential for discovery abuse and harassment.” 13 Cal.Rptr.2d at 366. “Vast numbers of personal injury claims could result in the deposition of the president of a national or international company whose product was somehow involved. It would be unreasonable to permit a plaintiff to begin discovery by deposing, for instance, the chief executive officer of a major automobile manufacturer when suing over a design flaw in a brake shoe . . .” *Id.*

Following the federal decisions regarding requests to depose upper level management, the *Liberty Mutual* court stated:

Consistent with these federal decisions, we hold that when a plaintiff seeks to depose a corporate president or other official at the highest level of corporate management, and that official moves for a protective order to prohibit the deposition, the trial court should first determine whether the plaintiff has shown good cause that the official *has unique or superior personal knowledge of discoverable information*. If not, as will presumably often be the case in the instance of a large national or international corporation, the trial court should issue the protective order and first require the plaintiff to obtain the necessary discovery through less intrusive methods. These

would include interrogatories directed to the high-level official to explore the state of his or her knowledge or involvement in plaintiff’s case; the deposition of lower level employees with appropriate knowledge and involvement in the subject matter of the litigation; and the organizational deposition of the corporation itself, which will require the corporation to produce for deposition the most qualified officer or employee to testify on its behalf as to the specific matters to be raised at the deposition. . . . Should these avenues be exhausted, and the plaintiff make a colorable showing of good cause that the high-level official possesses necessary information to the case, the trial court may then lift the protective order and allow the deposition to proceed.

10 Cal.App.4th at 1289, 13 Cal.Rptr.2d at 367 (emphasis added).

In *Crown Central Petroleum Corp. v. Garcia*, 904 S.W.2d 125 (Tex. 1995), the Texas Supreme Court announced similar guidelines to accommodate the problems that depositions of upper management present. Margaret Carl sued Crown Central for gross negligence after her husband died of lung cancer, which she alleged resulted from asbestos exposure. Carl filed a motion to produce the chairman of the board and chief executive officer of Crown Central. The company filed an affidavit of the chairman in support of a motion to quash the deposition notice; the affidavit explained that he had no personal knowledge of Carl’s husband, his job duties or job performance, and had no facts concerning alleged exposure to asbestos. The trial court denied Crown Central’s motion, so it appealed.

The Texas Supreme Court observed that “depositions of persons in upper level management of corporations often involved in lawsuits present problems which should reasonably be accommodated in the discovery process.” 904 S.W.2d at 128. The court issued guidelines for Texas trial courts to follow, which are similar to the guidelines set forth by the California court in *Liberty Mutual*, *supra*. The Texas court added that if the deposition is permitted, the trial courts retain discretion to restrict the duration, scope,

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and location of the corporate executive's deposition. 904 S.W.2d at 128.

No Deposition if No Personal Knowledge

Courts in a variety of federal districts, following the guidelines and analysis described above, protect senior level officials from depositions when the official lacks personal knowledge of the facts in dispute. See, e.g., *Thomas v. International Business Machines*, 48 F.3d 478, 482 (10th Cir. 1995) (upholding a protective order blocking the deposition of IBM's chairman where he had affirmed that he lacked personal knowledge of the plaintiff's allegations of age discrimination); *Lewelling v. Farmers Insurance of Columbus, Inc.*, 879 F.2d 212, 218 (6th Cir. 1989) (affirming issuance of a protective order prohibiting the deposition of the defendant's CEO who had no knowledge of the facts pertinent to plaintiffs' action); *Colonial Capital Co. v. General Motors Corp.*, 29 F.R.D. 514 (D.Conn. 1961) (ordering the discovering party to propound interrogatories—rather than seek a deposition—to General Motors chairman of the board and chief executive officer, who lacked personal knowledge of the facts at issue, but without prejudice to allow the deposition if the interrogatory answers regarding his participation in or knowledge of the issues appears to the court to warrant a deposition); *Armstrong Cork Co. v. Niagara Mohawk Power Corp.*, *supra* (disallowing depositions of corporate officers, directors, and employees where the proposed deponents had no knowledge of the facts, but without prejudice to the right to depose the officers and directors if the depositions of the employees suggested by the defendant were insufficient); *M.A. Porazzi Co. v. The Mormaclark*, 16 F.R.D. 383 (S.D.N.Y. 1951) (refusing to allow the deposition of a vice president where it appeared that the officer could contribute nothing beyond that which a more junior executive could provide).

Even where the corporate executive has some knowledge about the facts surrounding the lawsuit, courts will not require that the executives be deposed, absent a showing that the executive has “unique” or “superior knowledge.” These courts protect high-level officials who have some knowledge of the facts giving rise to the complaint by prohibiting the deposition until

after the plaintiff attempts to obtain factual information from less senior employees and demonstrates that the information plaintiff needs cannot be obtained from them. For example, in *Baine v. General Motors Corp.*, 141 F.R.D. 332 (M.D.Ala. 1991), a products liability action involving an allegedly faulty restraint system, the court refused to allow the deposition of a General Motors' vice president even though the vice president had authored a memorandum regarding the restraint system. In reaching its decision, the court relied on its discretion to control the timing and sequencing of discovery under Rule 26 of the Federal Rules of Civil Procedure. 141 F.R.D. at 334. The court also explained that Rule 26 allows a court to restrict discovery where it is obtainable from some other source that is more convenient and less burdensome. *Id.* Relying on Rule 26 and case law in other jurisdictions, the court concluded that it would not be appropriate to allow the deposition of the vice president. It explained:

The court finds that deposing [the vice president] at this time would be oppressive, inconvenient, and burdensome inasmuch as it has not been established that the information necessary cannot be had from [a junior executive] . . . interrogatories, or the corporate deposition. The corporate deposition has not yet been taken, and it could satisfy some of plaintiffs' needs. At the very least, it would aid in developing and refining a line of questioning. These avenues have not yet been exhausted or even pursued. It has also not been demonstrated that [the vice president] has any superior or unique personal knowledge of the restraint system or of the accident which led to the plaintiffs' decedent's death.

Id. at 335 (emphasis added). The court required the plaintiff to use other available means of discovery, including depositions of other employees, a deposition of a corporation representative, and interrogatories to obtain the information sought from the corporate executive. However, if the alternative discovery methods were inadequate, the court would consider allowing the vice president's deposition.

In *Mulvey v. Chrysler Corp.*, 106 F.R.D. 364 (D.R.I. 1985), plaintiffs sought to depose Lee Iacocca, then chairman of the board of

Chrysler, in a product liability suit alleging a defect in the fuel system of a Dodge van. Plaintiffs contended that he made certain damaging statements that were relevant to the defendant's liability in his biography. Because Mr. Iacocca was a “unique and important individual who can be easily subjected to unwarranted harassment and abuse,” the court found that he had a right to be protected, and that the courts have a duty to recognize his vulnerability. *Id.* at 366. Accordingly, the court ordered plaintiff to serve interrogatories, without prejudice to a subsequent deposition if the answers to the interrogatories so warrant.

In *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979), the Fifth Circuit upheld the district court's decision to vacate the notice of deposition of Upjohn's president, who had prepared a statement regarding the testing, marketing, and use of the drug that the plaintiff alleged caused her husband's death. Interestingly, this court observed that it would be very unusual to prohibit a deposition, and that such prohibition could be error, absent extraordinary circumstances. *Id.* However, the Fifth Circuit affirmed the trial court's decision in *Salter* to vacate the notice to depose the president because the plaintiff failed to first depose other more knowledgeable Upjohn employees. The plaintiff tried twice more to depose the president, but did not notice it properly. For example, the plaintiff noticed the deposition in Alabama rather than in Michigan where the president worked and resided. Plaintiff then raised the issue again by asking the court to order defendant to pay the plaintiff's counsel's costs to travel to Michigan for the deposition. Thus, the Fifth Circuit explained that the trial court did not prohibit the deposition; rather, it merely exercised its discretion to control the timing of discovery. The language of the opinion suggests that the appellate court would have allowed the deposition if notice had been proper, if the plaintiff had shown that efforts were made to obtain the necessary information from junior employees, and that those efforts did not result in a sufficient amount of information.

Deposition Allowed if Executive has Knowledge

Where the high-level executive has extensive personal knowledge of the facts

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at issue, or the claim requires the party to prove the executive's motive, courts have allowed the deposition of corporate executives. For example, in *Travelers Rental Co. v. Ford Motor Co.*, 116 F.R.D. 140, 145 (D.Mass. 1987), the plaintiff alleged antitrust claims against the defendant arising from incentive programs given to the plaintiff's competitors that guaranteed competitors a minimum price for vehicles when they disposed of them after using them as rental cars. After the plaintiff noticed the depositions of several high level executives, the defendant moved to quash or modify the notices. After a hearing, it was agreed that the plaintiff would first depose five officials who were not as high in rank as the sought-after deponents. After those depositions were completed, the plaintiff sought to depose the original deponents. Defendant refused to produce them on the grounds that the only purpose of such deposition was harassment and oppression. Plaintiff moved to compel.

The court in *Travelers Rental Co.* noted that the plaintiff asserted that the real purpose of the sought-for depositions was to explore the defendant's motive in implementing the guaranteed resale plan, and that it was not clear that this information was obtained through the original depositions or other sources. The court said, "[w]hen the motives behind corporate action are at issue, an opposing party usually has to depose those officers and employees who in fact approved and administered the particular action." 116 F.R.D. at 142. The court allowed the depositions of the four executives even though they did not recall the events at issue because: (1) the executives were personally involved in the decision to implement the incentive pricing plan; (2) their motive for doing so was relevant to the claim; (3) the plaintiff had already tried, without success, to obtain the necessary information through other sources; and (4) the depositions were preferable over other discovery methods because the executives' knowledge had to be refreshed. *Id.* at 142-46.

Additionally, in reaching its decision, the court found that the depositions were not sought for improper purposes. *Id.* at 146.

In *Speedmark, Inc. v. Federated Department Stores, Inc.*, 176 F.R.D. 116 (S.D.N.Y. 1997), the court allowed the deposition of Mr. Zimmerman, the defendant's chairman and chief executive officer, in a case arising from a contractual dispute. The chairman had allegedly been involved in the contract negotiations; or, at a minimum, he was involved in the concepts for the contract that preceded the one in dispute. The contract in dispute was a "lineal descendant" of the earlier contract that was negotiated by Zimmerman and the contracts at issue were similar or identical in some respects to the one that Zimmerman negotiated. The defendant opposed the motion and argued, inter alia, that another employee negotiated the earlier contract and that employee was available for deposition. The court rejected that argument and allowed the deposition because there was no evidence that the other employee was involved in all of the discussions between the plaintiff and Mr. Zimmerman.

Practical Guidance

For defendants faced with deposition notices for the company president or other senior executives, the case law set forth above provides a roadmap to respond to the deposition notice. While each case turns on the particular facts, corporate executives who have no knowledge of the facts at issue can avoid depositions with a detailed affidavit that describes the executive's job title and duties at the time of the deposition notice, and where appropriate, at the time of the events at issue. The executive's affidavit should demonstrate that his or her job duties would not put him or her in a position to learn or be knowledgeable about the facts at issue. A mere recipient of memoranda or letters that relate to the issue does not mean that the corporate executive must be subjected to deposition. *Liberty Mutual Insurance Co. v. Superior Court (Fryssinger)*, 10 Cal.App.4th 1282, 13 Cal.Rptr. 363 (1992) (explaining that it

would be unreasonable to allow a plaintiff to begin discovery by deposing a company executive merely because the executive was copied on correspondence).

Where a corporate executive has some knowledge of the facts at issue, a deposition can be avoided by demonstrating that the executive does not have "unique" or "superior" knowledge of the events at issue. Additionally, corporate counsel should propose depositions of less senior employees who are as knowledgeable or more knowledgeable about the events at issue. Again, detailed affidavits of the senior executive and the less senior employees, who are available for deposition, will bolster the defendant's arguments. Under *Baine* and *Salter*, courts should preclude the deposition of corporate executives where other less senior executives are available for deposition and plaintiff cannot show that the executive has "superior" or "unique" knowledge. At a minimum, the corporate defendant should urge the court to order that the examination of a corporate executive, if it must take place, be done by interrogatories. See *Mulvey v. Chrysler Corp.*, *supra*. In short, the case law allows a court to use its discretion to control the order and timing of discovery to reduce or avoid the burden of corporate executive depositions.

Conclusion

Rule 26 of the Federal Rules of Civil Procedure and state counterparts to Rule 26 allow courts to fashion rules for discovery that avoid unnecessary burden and harassment of corporate executives. As stated by the court in *Mulvey*, a senior officer in a large company is a "unique and important individual who can be easily subjected to unwarranted harassment and abuse. He has a right to be protected, and the courts have a duty to recognize his vulnerability." 106 F.R.D. at 366. With the court-developed guidelines set forth above and Rule 26, the courts have the framework to carry out this charge.

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Welcome New Members

We wish to welcome the following new members who have joined our chapter recently:

Ed Amaya, W.L. Gore & Associates, Inc.

Robert Anderson, Salt River Project

Lenin Arthanari, Salt River Project

M. Margaret Banas, Henkel of America

Steve Doncaster, Salt River Project

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